GOH CHOON LYE

v.

ALLIANCE BANK (M) BHD

HIGH COURT MALAYA, PENANG
RK NATHAN J
[BANKRUPTCY NO: 29-4049-2002]
27 AUGUST 2003

BANKRUPTCY: *Notice - Founded upon default judgment - Whether default judgment was not a final judgment as required under s. 3(1)(i) Bankruptcy Act 1967 - Claim was for liquidated sum - Whether O. 19 r. 2(1) Rules of the High Court 1980 applied to render judgment a final judgment*

The judgment creditor ('JC') had obtained a judgment in default of defence ('the judgment') against the judgment debtor ('JD'). The JD applied to set it aside but that was dismissed both by the senior assistant registrar ('SAR') and the judge in chambers. The JC filed a bankruptcy notice against the JD and the JD's application to set that aside was also dismissed by the SAR. Hence, the JD's appeal to this court.

The JD contended that the bankruptcy notice was not based on a final judgment as required under s. 3(1)(i) of the Bankruptcy Act 1967.

Held:

[1] Since the JC's claim against the JD was in respect of a liquidated sum, O. 19 r. 2(1) of the Rules of the High Court 1980 ('RHC') was applicable. The application to set aside the default judgment was dismissed both by the SAR and the judge in chambers. Therefore, there was clearly a 'final judgment' within O. 19 r. 2(1) RHC. Although the JD had appealed to the Court of Appeal, until such time that appeal was allowed, the judgment remained a final judgment on which the JC was at liberty to execute. However, the JC should be aware that if the JD succeeded at the Court of Appeal, the JC could be subjected to a suit for malicious prosecution as in the case of *Vijendran Ponniah v. MBf Country Homes & Resorts Sdn Bhd & Anor.* (pp 114 d-e & 115 c-d)

[Appeal dismissed.]

Case(s) referred to:
Re Udos Riging, ex p Seabanc Kredit Sdn Bhd [1994] 3 MLJ 383 HC ***(dist)***
Vijendran Ponniah v. MBf Country Homes & Resorts Sdn Bhd & Anor [2002] 2 CLJ 157 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Rules of the High Court 1980, O. 19 r. 2(1)
Subordinate Courts Rules 1980, O. 28 rr. 6(1)(a), 8(1)

For the judgment debtor/appellant - K Balasundaram; M/s Balasundaram & Co
For the judgment creditor/respondent - Naseema Jalaludheen; M/s Cheong Wai Meng & Van Buerle

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

Judgment in default of defence was entered against the defendant on 16 August 2002. The application to set aside the judgment in default of defence was heard on 7 November 2002 and dismissed on 20 November 2002 by the learned deputy registrar. A bankruptcy notice was filed on 19 December 2002 and served on the judgment debtor on 22 November 2002. The appeal to the judge in chambers against the decision of the learned deputy registrar was heard and dismissed on 10 February 2003. The application to set aside the bankruptcy notice was heard on 28 February 2003 and dismissed by the learned senior assistant registrar on 4 April 2003. This is the judgment debtor's appeal against the decision given on 4 April 2003.

Case Of The Appellant

Mr. Balasundaram for the appellant contended that the judgment upon which the bankruptcy notice is founded, is not a 'final judgment' as is required to be, pursuant to s. 3(1)(i) of the Bankruptcy Act 1967 which reads as follows:

> 3(1) A debtor commits an Act of bankruptcy in each of the following cases:
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the

judgment or order with interest quantified up to the date of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

Counsel for the appellant relied heavily on *Re Udos ak Riging, ex p Seabanc Kredit Sdn Bhd* [1994] 3 MLJ where Abdul Kadir Sulaiman J (as he then was) had held that for the purpose of bankruptcy proceedings, a default judgment is not final because it is not decided on the merits and since any judgment not given on merit is liable to be set aside on application because it had not finally disposed of the rights of the parties, such a judgment could not be construed as a final judgment within the meaning of s. 3(1)(i) of the Bankruptcy Act 1967. He further went on to hold that if the debtor had not appealed within time, the default judgment would have crystallised into a final judgment.

In *Vijendran Ponniah v. MBf Country Homes & Resorts Sdn Bhd & Anor* [2002] 2 CLJ 157, the plaintiff an advocate and solicitor, sent his bills to the first defendant and its holding company for the facilities agreement and loan agreement prepared. Subsequently, on 29 March 1988, the first defendant sent a notice of demand to the plaintiff who was a holder of a credit card from the first defendant, claiming the sum due on the credit card. By a letter dated 6 April 1988, the plaintiff denied owing the sum to the defendant. Instead, the plaintiff demanded payment on his bill which far exceeded the sum claimed by the first defendant. A summons was issued by the first defendant on 23 April 1988 but was never served on the plaintiff. The first defendant nevertheless proceeded to obtain judgment in default of appearance against the plaintiff on 28 June 1988. Four years later, on 1 December 1992, the first defendant instructed the second defendant to commence bankruptcy proceedings against the plaintiff. Upon the publication of the creditor's petition against the

plaintiff in the newspaper, the plaintiff applied to set aside the service of summons. On the preliminary issue that the summons was never served on the plaintiff, the learned magistrate set aside the service of the summons on 22 August 1995 and struck out the creditor's petition. The plaintiff filed this action to claim for damages for civil malicious prosecution arising out of the bankruptcy proceedings and for abuse of court process. Although I followed the decision in *Re Udos ak Riging*, there is one big difference between the facts in *Vijendran Ponniah* and in the case before me. In the former, judgment was in default of appearance and the default judgment was never served on the plaintiff thus giving him no opportunity to set it aside and that therefore the default judgment had not crystallised into a final judgment. In the case before me the judgment was in default of defence.

Findings Of The Court

Order 19 r. 2(1) of the Rules of the High Court 1980 (the RHC) reads as follows:

> Where the Plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

Since this claim is in respect of a liquidated sum, clearly O. 19 r. 2(1) applies. Where no defence is filed in respect of an unliquidated claim then O. 19 r. 3 applies whereby after the expiration of the period fixed by or under the rules for service of the defence, the plaintiff may enter interlocutory judgment against the defendant for damages to be assessed, and for costs.

The words 'final judgment' in O. 19 r. 2(1) must have significance. There was no question as in *Vijendran Ponniah* that the default judgment was not served on the appellant. Although I had followed the decision in *Re Udos ak Riging*, I must hasten to add that in *Re Udos ak Riging*, the judgment in default was obtained pursuant to O. 28 r. 6(1)(a) of the Subordinate Courts Rules 1980 (the SCR) which is reproduced herewith for ease of reference:

> If, when an action, other than actions to which Orders 43, and 45 apply, is called on for hearing, the plaintiff appears but the defendant does not appear, the Court may:
>
> (a) if the defendant has no counterclaim, on proof of service give judgment for the plaintiff on his claim.

It is important to note that the said sub-r. (a) does not state 'final judgment'. Order 28. r. 8(1) of the SCR further provides that any judgment or order obtained where one party does not appear at the hearing, may be set aside by the court, on the application of that party, on such term as it thinks just.

Having obtained such a judgment, and whilst the debtor had applied under sub-r. 8(1) to set the judgment aside and whilst parties were awaiting a hearing date for the application to set aside, the petitioner served a bankruptcy notice on the debtor.

The facts of the case before me are totally different. Here the application to set aside the default judgment was dismissed both by the learned senior assistant registrar and the judge in chambers. There is clearly in the words of O. 19 r. 2(1) of the RHC, 'a final judgment'. The defendant has argued that he has appealed to the Court of Appeal. That may well be so but until such time as that appeal is allowed this judgment remains a final judgment on which the plaintiff is at liberty to execute. Of course the plaintiff must be aware that if the defendant succeeds at the Court of Appeal, the plaintiff could be subjected to a suit for malicious prosecution as happened in *Vijendran Ponniah.* But then, such are the affairs of litigation, giving meaning to the saying "as you sow, so shall you reap".

I had no hesitation in dismissing the appeal with costs.